

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA**

**HOSPITAL AND HEALTHCARE EMPLOYEES
UNION, LOCAL 399, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL–CIO (Forester
Haven)**

and

Case 31–CB–11324

ADRIENNA MATUS, an Individual

Jerry J. George, Los Angeles, California, for the
General Counsel.

Monica T. Guizar of Weinberg, Roger & Rosenfeld,
Los Angeles, California, for Respondent

DECISION

Statement of the Case ¹

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Los Angeles, California on January 13 and 22, 2004, based on a complaint issued on October 23, 2003 by the Acting Regional Director for Region 31. The complaint is based upon an unfair labor practice charge filed by Adrienna Matus, ² an Individual (Matus or the Charging Party), on July 28, 2003. It alleges that Respondent, Hospital and Healthcare Employees Union, Local 399, Service Employees International Union, AFL–CIO, has violated §8(b)(1)(A) of the National Labor Relations Act (the Act). Respondent denies the allegation.

Issues

The issue presented is whether Respondent, a labor organization, violated its duty of fair representation in its treatment of Adrienna Matus, an employee of a nursing home, Forester Haven, with whom Respondent had a collective bargaining agreement covering its non-professional employees, including Matus, who was a long-time housekeeper/custodian. The General Counsel asserts that Respondent did not meet its duty of fair representation in handling

¹ Dana S. Martinez, of Holguin and Garfield, Los Angeles, appeared for Service Employees International Union, Local 434B, concerning a subpoena matter.

² Previously known as Adrian Matus; the Employer's documentation refers to her by that name as does an April 2000 note taken by union representative Joel Lozada.

a grievance Matus initiated concerning her discharge on February 4, 2000. Respondent defends on two grounds: first, it asserts the matter is barred by the 6-month limitations period set forth in §10(b) of the Act;³ second, it asserts that its handling of the grievance was proper and met the duty of fair representation. The General Counsel rejoins that the §10(b) period was tolled and has never run because Respondent never gave Matus notice that it had declined to arbitrate the grievance. In some respects the case presents matters of credibility; nonetheless, many of the facts are undisputed. Both parties' witnesses suffered from a lack of good recall due to the passage of time, between 3 and 5 years, depending on when any given conversation occurred.

Both the General Counsel and Respondent waived the filing of briefs; instead, each argued orally and provided a list of authorities (case law) in support of their respective contentions.

Findings of Fact

I Jurisdiction

Respondent admits that the Independent Order of Foresters, a Canadian fraternal benefit society, operates a residential care and nursing facility in San Fernando, California known as Forester Haven. It further admits that the Employer's annual gross revenues exceed \$250,000 and that the facility annually purchases and receives goods, supplies and materials directly from sources outside California valued in excess of \$50,000. As a result, it admits Forester Haven is an employer with in the meaning of §2(2), (6) and (7) of the Act. Respondent also admits it is a labor organization within the meaning of §2(5) of the Act.

II. The Factual Outline

Matus was originally hired by Forester Haven in 1987. Her last day of work was January 20, 2000. The Employer discharged her on February 4, 2000, because, according to the discharge slip, she had been "absent from work for three consecutive days without reporting the absence to the Employer, unless circumstances make it impossible to notify the Employer," (apparently quoting language from the collective bargaining contract). During that period of time she had been hospitalized, but the employer had reason to believe she had spoken to a co-worker during her absence (to obtain a paycheck), yet had never chosen to contact anyone in management about her circumstances. She was released from the hospital on February 12, 2000 and, upon returning home, discovered the discharge slip which the employer had mailed her several days earlier.

Sometime within the following 2 weeks she contacted Blanca de Correa, her union representative, to tell her what had happened. Matus believed her termination was unjust because it had occurred during the time she was in the hospital. De Correa did not testify but what followed over the next month or so is not in dispute. De Correa agreed to file a grievance on Matus' behalf, though it is not in evidence and, following a meeting with Matus at the Union office, did so. At that meeting Matus provided de Correa with a copy of the discharge slip.

³ Section 10(b) of the Act includes a 6-month limitations period during which unfair labor practice charges must be filed. The statute reads in pertinent part: ". . . no complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

On March 7, 2000, union representative Joel Lozada ⁴ wrote a letter to Forester Haven's administrator, Joel Kirschner, requesting a Step I grievance hearing ⁵ (a meeting with management) to discuss the grievance. The meeting was held at the nursing home on March 30, 2000, attended by Matus, de Correa and Kirschner. At that time de Correa presented information and documentation on Matus' behalf requesting Kirschner to reverse the discharge decision. Kirschner agreed to reconsider the matter in light of what had been offered. On April 3, Kirschner wrote Matus a letter (copy to de Correa) advising of his decision. Styling the March 30 conference as a Step III meeting, Kirschner first observed that the grievance was [contractually] untimely (said to be asserted in a March 10 letter, not in evidence). He then dealt with the merits, saying that in consideration of the responses Matus had given during the meeting, he had determined to uphold the discharge as appropriate discipline.

According to Matus, after the meeting with Kirschner, de Correa gave her a ride home. During the ride, Matus says de Correa told her: ". . . it was going to take four to five years to take this to arbitration and that she was going to consult with the attorneys."

Matus also testified that after the March 30 drive-home conversation, she had several more conversations with de Correa, some on the phone and at least one in person. Matus reports they were all to the same effect: "The same thing, that it would perhaps take four to five years and that she was going to talk with the union attorney. And almost toward the end of April she told me that she would no longer handle my case and that from that point on Mr. Joel Lozada would be handling it."

On the occasion when de Correa told her Lozada would be taking over, they were at the Union's office. Matus said de Correa asked Lozada over and Matus and Lozada spoke in a hallway. Matus says Lozada "just told me that he was going to take it to arbitration and that he would consult with the attorneys and that's all."

Lozada had very little recollection about the matter, though he recalled telling Matus that the amount of time the entire matter would take could not be predicted. He had, however, made a file note in April (R.Exh. 4(b)) to the effect that he had spoken to Adrian and explained that "most probably we would not be able to win" because the administrator knew she had spoken to an employee about her absence while in the hospital, but had not spoken to the administrator, and it looked like Matus had abandoned the job. He also said that he usually tells grievants that

⁴ Lozada was a relatively new union official. He had been a union steward at Kaiser Permanente and was, during this time period, serving intermittently as a union representative. Later, he became a full time employee of the Union. As an intermittent representative he was assigned to work in different areas of the industry and his responsibility in those fields was not continuous. De Correa served as his lead person for the time he worked in the nursing home division.

⁵ Presumably the grievance-arbitration procedures are set forth in the collective bargaining agreement. However, despite my suggestion, the General Counsel did not offer the pertinent language in evidence. Usually grievance steps beyond the initial steward-supervisor level are steps more advanced than Step 1 which Lozada had sought.

their cases need to be reviewed by his supervisors and the Union's attorney. Most likely, Matus' testimony and Lozada's note refer to the same conversation.⁶

Lozada, despite his reservations, wrote two form letters on May 12, 2000. The first was to Kirschner saying the grievance was being referred for "final and binding arbitration." That letter was not sent to Matus. The other was. It explained the Union's procedure to her:

SEIU, Local 399 has submitted your grievance to arbitration only to preserve the time limits required for such filing. In the coming weeks we will review your case in consultation with our attorneys. This process will take several weeks due to the large volume of grievances pending arbitration review.

If SEIU, Local 399 believes that your grievance lacks merit and they deny arbitration, you will have an opportunity to provide additional information to appeal this decision.

Obviously, the Union was saying different things to each of the parties. The reality was that it had no intention of proceeding to arbitration until an internal review was completed. That is the message it conveyed to Matus; indeed, the letter to Matus seems to support Lozada's belief that he told her in April that the case would go through a review before a final decision to go forward would be made. There is no evidence that Lozada ever told Matus that the matter would take 4 to 5 years, the time frame Matus says de Correa told her to expect.

The Union transmitted a different message to Kirschner: it intended to arbitrate the matter. The record does not demonstrate that Matus was aware of the language to the Employer. She only knew that the matter had been procedurally moved to the arbitration stage in order to avoid a time bar and the Union would then make a determination regarding whether it would proceed. She also knew that if it decided the merits were too weak to warrant arbitration, it would give her an opportunity to present additional evidence. It did not offer, as the General Counsel avers, an internal appeal. At best it would have been a reconsideration in light of any additional evidence.

Matus testified that after the May 12, 2000 letter she had difficulty reaching Lozada. She said, "I left him messages sometimes, but he did not return my messages. But whenever, sometimes I was able to locate him. I would sometimes call three times a week, I was able to locate him. I don't know -- one or two times in the -- and we would discuss the same things. But I didn't see any progress. I mean, he would not tell me when the arbitrations would take place." She testified that she was able to see him at the office twice and spoke with him twice on the phone.

In her investigative affidavit, she said, "Lozada notified me by letter dated May 12, 2000, that Local 399 had submitted my grievance to arbitration only to preserve the time limits required for such filing. After I received Lozada's letter, I called [the] union multiple times (once or twice a week) and left messages for Lozada, but he never returned my calls. I also went to the union office about three times a week see Lozada without success."

This state of affairs continued until April 11, 2001, when Matus hand-delivered a hand-written letter (in Spanish) addressed to three union officials, including de Correa and Lozada. In

⁶ The General Counsel challenges the verities of the April 2000 note observing that it is written in two different color inks and has an unclear date. However, on its face Lozada wrote that he was serving as the "rep of the day", a post which undoubtedly is filled with distractions. In fact, Matus' appearance may have been one of the distractions, since, as she said, they spoke in the hallway. If they did so, that might partially explain the disjointedness of the note, since he seems to have started it concerning another topic, before memorializing the discussion with Matus. It might also explain the different inks.

that letter, translated by the official translator on the record (the word 'you' is plural in all instances) she wrote:

On multiple occasions I have visited you at that facility with the purpose of knowing about the last date allowed for the arbitrations about my case in that my termination was on February 4, 2000, a date in which I was still hospitalized. It's been more than a year that I continue to be in wait of being informed as to the progress of my case and as of yet I have not received any notification. For this reason and in the most attentive manner, I beg of you to let me know about the, the progress and the date of the arbitrations. With no other particular, I reiterate to you the assurance of my [intent ?] and distinguished consideration.

Matus testified that she never received a reply to the letter. Neither did she follow up herself to determine why no reply had come.

During this period of time, David Estrada was the director of Local 399's convalescent homes division and responsible for determining which grievances would proceed to arbitration and which would not. He was de Correa and Lozada's supervisor. He testified that sometime in 2001 he met with both Lozada and de Correa to discuss what to do about the Matus grievance. After that discussion he decided that the grievance would not be pursued to arbitration. He had determined that the Union would not be able to prevail based on the facts as he understood them.

He also recalls that Lozada, per his instructions to do so, later reported that he had contacted Matus and had advised her of the decision, also sometime in 2001. As a result, on July 26, 2001, the file on Matus' grievance was closed.

Lozada gave the following testimony concerning the handling of the decision not to take the matter to arbitration:

Q BY MS. GUIZAR: And did you meet with Blanca [de Correa] regarding the merits of the case?

A Yes, we stayed in contact with Blanca and David Estrada and the attorneys so that we could make sure that we were making the right decision on the merits of the case.

Q Do you recall which attorney, if any, was consulted regarding the merits of this case?

A I believe it was Jim Varga because I think he was the one that was handling the convalescent division.

Q And do you know which firm Jim Varga is a member of?

A Rosenfeld -- I'm sorry -- your firm.

MS. GUIZAR: Okay. For the record, our firm is Weinberg, Roger & Rosenfeld.

JUDGE KENNEDY: And Mr. Varga is a --

MS. GUIZAR: Is a partner with the law firm.

JUDGE KENNEDY: Okay.

Q BY MS. GUIZAR: Do you recall what opinion, if any, was formed after consulting with Blanca, David Estrada and Jim Varga regarding the merits of the case?

A No. In regards -- it was formed between them three now.

Q Okay.

A I -- I remember when I was involved with it, we said that we didn't have merits to go forward.

Q Okay. And was there ultimately a decision made as to whether or not to proceed to arbitration in this matter?

A Yes.

Q And who made that ultimate decision?

A Well, David Estrada closed the case, yes.

Q And what was the decision?

A Not to take it forward.

Q Okay. And did you inform Ms. Matus that the matter was not -- could not be taken to arbitration?

A When we had our conversation, I thought that in our conversation we had the understanding that the case was not going to go forward to arbitration, an understanding.

Q Okay. Did you write down any notes regarding your conversation with Ms. Matus?

A Yes.

Lozada's recollection about the event was vague due to the passage of time, 2-½ years before his testimony. The note was offered as a routine business entry; in some respects its nature matches well with the one made a year earlier.

Lozada had found in the file his note which he had dated "June 2001." It did not reference a day of that month. The note is the only record Lozada made of the conversation. In some respects, the note is a bit odd. Aside from the lack of a specific date, parts appear to be written by two different people, for the handwriting slant is quite different between the first paragraph and the last two paragraphs. Nonetheless, Lozada assured me on the record that he had written it all. Its substance is little different from the similar note of April 2000, repeating that he had spoken with Matus and explained that the Union was not going forward with the grievance because while in the hospital he had spoken to a co-worker about picking up a paycheck, but not to the administrator to report her situation. It looked like he had abandoned his job. Lozada concluded with "This conversation was to make sure of the position that we were in as far as it's merits for arbitration. Adriana Matus understood."

This raises a credibility question concerning whether the Union, as Matus testified, never responded to her letter of April 11, 2001. Lozada's note saying he informed her of the Union's decision occurred about 7 weeks after Matus' letter.

Not until about the end of June 2003 did Matus resume pursuing the matter. She telephoned the Union and spoke to Lozada. At this point Lozada had long since considered the matter dead. Furthermore, representation of the nursing homes was in the process of being transferred to a different SEIU local union, Local 434B. Indeed, that union had been serving as Respondent's agent for contract administration purposes for several months. As a result, Lozada, not thinking she could be speaking of the 2000 grievance, referred her to Local 434B. As a result, someone from that union actually spoke to administrator Kirschner about her.

The passage of time and Lozada's perceived 2003 avoidance caused Matus to file the instant unfair labor practice charge on July 28, 2003. This complaint followed.

III. Analysis and Conclusions

Generally speaking, a labor union owes a duty of fair representation to all the employees it represents. *Vaca v. Sipes*, 386 U.S. 171 (1967). The Supreme Court said there that a union breaches the duty when its conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith. Although a union may not ignore a meritorious grievance or process it in a perfunctory fashion, a union is afforded broad discretion in deciding which grievances to pursue and the manner in which to handle them. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986); *Associated Transport*, 209 NLRB 292 (1974). Mere negligence is insufficient to establish a breach of the duty of fair representation. *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504, 508 (1979); *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446, 448 (1974); *Operating Engineers Local 18 (Ohio Pipeline Constr. Co.)*, 144 NLRB 1365 (1963). Indeed, an employee does not have an absolute right to have his or her grievance taken to arbitration. *Vaca v. Sipes*, supra, 190-191; *Teamsters Local 337 (Swift-Eckrich)*, 307 NLRB 437, 438 (1992).

Furthermore, when a union decides to process a grievance but decides to abandon it short of arbitration, a finding of a violation turns not on the merit(s) of the grievance, but on whether the union's disposition of the grievance was arbitrary, perfunctory, motivated by ill will or other invidious considerations. *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979); *Service Employees Local 3036 (Linden Maintenance)*, supra. Rather clearly, there is no evidence of any personal animosity by Respondent toward Matus. Nor is there direct evidence of any arbitrariness or invidious treatment. The General Counsel initially perceived mistreatment based on Lozada's sending Matus to Local 434B in June 2003, believing it to be a defunctive and therefore deceitful act, even though occurring 2 years after the operable facts. Now he seems to assert that such evidence may be found in Respondent's failure to communicate either timely or effectively.

The instant case must be parsed in several ways under the fair representation doctrine. First, since Matus had no absolute right to have her grievance be arbitrated, it presents the threshold question of whether Respondent Union ever promised to undertake Matus' grievance to arbitration. Then, if it did, whether it changed its mind but failed to notify her that it had done so. To be sustained, this question requires a credibility finding favoring Matus' version. Then, did the Union give Matus a valid reason for declining to pursue the matter further? When it did notify her; were its reasons adequately articulated? Did it keep its decision, rational or not, a secret from her? Did Matus sleep on her rights allowing the limitations period to pass? Should she have taken more steps to keep herself informed of the grievance's status? Why did she not continue to pursue the matter after she wrote her letter of April 11, 2001? Did the §10(b) period begin running on April 11, 2001 even if it had been tolled until then?

Fortunately, these questions become mostly rhetorical after answering the first: Did the union ever promise it would take her grievance to arbitration? The answer is quite simple: it did not.

The principal evidence advanced by the General Counsel is Matus' testimony that de Correa, beginning with the March 30, 2000 ride-home conversation, followed by several near identical comments, said: ". . . it was going to take four to five years to take this to arbitration and that she was going to consult with the attorneys." Standing alone, that comment does not qualify as a promise to arbitrate the grievance. Indeed, Matus agrees de Correa said that the Union needed to consult its attorneys before any further steps would be taken. It is true that de Correa seemed to offer hope that the grievance would go to that next step, but it was far from a promise that it would do so. Furthermore, the reference to 'four or five years' before resolution can only have been de Correa's best guess concerning how long the process might take before it was finally resolved; it had nothing to do with when arbitration would commence. Perhaps de Correa might have been more clear, but on its face, Matus' understanding is not the way a reasonable person would have taken it. The General Counsel argues that a negative inference should be drawn from de Correa's failure to testify. However, given Matus' own words, what would have been the point? At best it would have amplified Matus' mistaken perception, one which I readily perceive without need for explanation, for it is the only plausible interpretation.

The next thing that happened was Matus' meeting with Lozada who took a less hopeful view. His note reflects that he told Matus the merits were weak because she had not taken the proper steps to notify the administrator of her hospitalization, but had nevertheless been strong enough to contact a fellow employee about a paycheck. To him it looked like the administrator could prevail on the contention that Matus had abandoned the job.

If there were any doubt left about the lack of a promise, it was put to rest by the May 12, 2000 letter Lozada sent her. He explained clearly that the Union had not determined to take the case to arbitration, but had only taken a procedural step to prevent a time bar

dismissal. This was significant because there were a large number of grievances which needed to be considered before hers.

It is at this point that the General Counsel raises his next best argument, that the letter advised she would be notified if the Union decided not to proceed to arbitration. Yet, in itself, that is an acknowledgement that the Union had not decided to proceed. Nothing up to that point had qualified as a promise that the Union would exercise its broad discretion in favor of arbitration. Indeed, all the signs pointed the other way. Lozada, the person to whom the grievance had been assigned, had already prepared Matus for the letdown. He thought her case was weak and had told her so.

Given that no one ever told Matus her case was going to arbitration, I have difficulty in determining what the Union did which qualifies as a breach of the duty of fair representation. Nothing in the law requires a Union to proceed past representing a grievant in the grievance process. *Vaca*, supra; *Swift-Eckrich*, supra. And, de Correa did properly process the grievance up to the point where the Employer rejected it. She met with the nursing home administrator but was unable to persuade him to reverse his decision. Her behavior was neither arbitrary, capricious nor invidious. She permitted Matus to present her case and advocated on her behalf. Once that stage was over, the union was under no obligation to do more, for there is no absolute right to arbitration, even for meritorious grievances.

True, if Respondent did take steps to arbitrate, it needed to act fairly. It could not mislead the grievant, nor, if it began the arbitration process could it drop it arbitrarily, capriciously or invidiously. But the hard fact is that it never undertook to arbitrate this grievance in the first place. It never told her it would and it never misled her about it. It just didn't go forward, and the last Matus says she had heard about it was Lozada's hallway assessment that the merits were weak. In a perfect world, the Union should have promptly come back after analyzing the merits and told her in writing it was not going to arbitration because it didn't think the case was winnable. But union representation is an imperfect field and it did not get around to even analyzing the merits for decisional purposes until a year had passed. Most labor unions do not want to leave a member hanging and do not. It is bad for business. Yet, for whatever reason, this Union did not perform the promised review in a timely way. Even so, that shortcoming does not qualify as arbitrary, capricious or invidious. It doesn't even qualify as negligent. It was simply slipshod work. As such, Matus' remedy is to reach out to the Union hierarchy through the political process, not through the Board or even the courts. Within weeks of that review, however, the Union did contact her, at least according to Lozada's note and testimony.

Matus claimed after May 12, 2000 that she continued to contact the Union on a regular basis, but her testimony is subject to grave doubt on the point. Even so, she was finally sufficiently unhappy with the lack of response from the Union that she wrote her April 11, 2001 letter.

According to Matus, she never got a response (dubious testimony in view of Lozada's second note) but thereafter, she did nothing. She did not pursue the matter within the Union, though she clearly knew how to do so. She knew where the office was. She could have gone up the hierarchy to someone in greater authority. She might well have found Estrada. She could have complained at a union meeting. But she did nothing until she called again 26 months later. By then Lozada was out of the nursing home division; indeed, the Respondent Union was almost out of the convalescent home representation business, poised to turn it over to Local 434B. Matus had been out of Lozada's sight and out of his concern for over 2 years. He, not realizing that she was still speaking of the same grievance, turned her over to Local 434B who was handling all current business. Believing she was getting the runaround, she filed the instant charge.

While she didn't get a written response to the April 11, 2001 letter, it had probably triggered Estrada's review of the grievance. Legally, it appears that if Estrada had thought the case had merit, he could have authorized arbitration. Yet, his review with Lozada and de Correa led Estrada to reach the same result Lozada had prepared her for: They couldn't win because she hadn't spoken to the administrator about her situation, yet had spoken to a fellow employee. Estrada instructed Lozada to advise her of the decision and Lozada's note suggests he did. Again, in a perfect world, a letter should have been written. It was not.

For argument's sake, I will assume that prior to Matus' April 11, 2001 letter the Union was keeping its decision not proceed a secret and the §10(b) period was tolled (though in fact the Union had simply not yet made a decision). Once there was no answer to her letter, I believe the §10(b) period began to run. While I am not certain when it actually began under that scenario, I can say with utter certainty that it ended sometime during that 27-month period which followed. At least three 6-month periods passed during that time frame, if not four. If Matus's April 11, 2001 letter qualified as an act of due diligence, her subsequent inactivity vitiated it. As *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), informed by *Garrett Railroad Car & Equipment*, 289 NLRB 158 (1989), have told us, a charging party cannot rely on its own inaction to toll a limitations period, even where fraudulent concealment may be involved.⁷ Here, of course, there is no evidence of fraudulent concealment, only ineptitude on the part of both the Respondent Union and the Charging Party. Indeed, there is some evidence that Respondent had informed Matus of its decision. Instead of continuing to press the Union regarding the status of the grievance, Matus declined to exercise any diligence, much less due diligence or reasonable diligence after April 11, 2001. She either knew, or should have known that something had gone wrong with the Union's review system. Frankly, her behavior suggests not that she slept on her rights, but that she had learned from Lozada that the Union was not going to proceed. In 2003, for whatever reason, she decided to reactivate her inquiry. A 2-year hiatus such as this was not because she didn't know what was going on, or had been kept in the dark; more likely it was because she decided well after the fact not to accept what Lozada had told her, probably to take a monetary longshot. Hers is not the behavior of someone who has been duped; it is the behavior of one who is seeking a second bite at the apple.

⁷ Judge Itkin in *Garrett*, supra, at 161, said:

Holmberg v. Armbricht, 327 U.S. 392, 397 (1946), articulated a refinement of the doctrine for cases of fraudulent concealment:

Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

The court observed further, "[this equitable doctrine is read into every federal statute of limitations." *Id.*

Subsequent case law confirms that due diligence is an essential constituent of the tolling rule. It is applied even where there has been fraudulent concealment. In those instances, the courts have stated that "merely intoning the word 'fraudulently' is not sufficient to avoid the statute . . . [T]he elements of this counterpoise . . ." include the exercise of due diligence. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). A party's mere ignorance of the circumstances "does not constitute due diligence to discover the operative facts of his claims." *Shapiro v. Cook United, Inc.*, 762 F-2d 49, 51 (6th Cir. 1985); see also *Demars v. General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985); *Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299 (7th Cir. 1983). (Underscore supplied.)

Now it should be said that had the §10(b) period not run in this case, and merit found in the failure of notification, the remedy would be quite limited. The General Counsel has pleaded ⁸ for a remedy requiring the Union to take the arbitration forward, permitting Matus to hire her own lawyer at the Union's expense. Aside from it's being both imaginative and extraordinary, I find that remedy not to be tailored to the violation. Moreover, it would be nothing more than an exercise in futility. The General Counsel has made no effort to evaluate the merits of the grievance. The only evidence about that topic comes from the documentation, both from the Employer and the Union. Essentially it boils down to an attendance violation question, the parameters of which are not entirely clear given the lack of a collective bargaining contract or a copy of the attendance rules. We also have Lozada's notes and Estrada's testimony that the case was not winnable. Since the burden of showing the proposed remedy to be appropriately tailored to the violation rests with the General Counsel, it was incumbent upon him to present evidence that the grievance had merit. See *Ironworkers Local 377 (Alamillo Steel)*, supra. Then, and only then, could such an extraordinary remedy be considered. But, the General Counsel presented no such evidence and the only evidence I can see cuts the other way. On this record, I can only presume that the grievance did not have merit and was, as the union officials have opined, unwinnable. That being the case, at best the only unfair labor practice would be Respondent's failure to clearly inform the grievant of the outcome of the Union's analysis of the merits. Such a remedy would entail no backpay, no right to seek backpay and no right to require the union to pay for a lawyer to chase a rainbow. Instead, it would simply require an order requiring Respondent to cease and desist failing clearly to inform grievants of the results of its internal review of the merits and its decision not to arbitrate. Yet, given the passage of the §10(b) period, even that remedy is not available.

One more thing needs explication. At all times since Matus was released from the hospital on February 12, 2000, she has been fully disabled and incapable of any work whatsoever. She acknowledged as much on the stand. ⁹ This raises a very significant remedial issue, even assuming Respondent had failed in its duty of fair representation. Since she could not have worked at any time after her hospitalization, what is it that the Union's successful prosecution of the grievance could have achieved for her? As a practical matter it could have gained nothing, for backpay would be available only for a period of time she was able to work. Yet there is no such time frame; she has admitted as much. It might be said that a public remedy would still lie; that the Board could order Respondent not to mishandle grievances in the future, together with a notice to that effect. Certainly that possibility should not be lightly dismissed. Still, if the Union were aware of her disability, would it not have been reasonable for it to conclude that no practical remedy could be obtained, or that such a remedy was so hollow as to not be worth pursuing? If, say, in response to Matus' April 11, 2001 letter, it tentatively decided to proceed, but upon learning of the disability (no doubt it already knew it), changed its mind, how could that decision be second-guessed under a duty of fair representation analysis? Unions, like the rest of us, need to be practical. Expenditure of monies for a principle is not within the reach or determination of everyone, particularly a labor union which no doubt allocates its resources in a manner which it thinks benefits most the represented employees.

⁸ In support of the remedy the complaint cited a superseded case, *Rubber Workers Local 250 (Mack-Wayne-Closures)*, 290 NLRB 817 (1988). Such remedies are now governed by *Ironworkers Local 377 (Alamillo Steel)*, 326 NLRB 375 (1998).

⁹ Matus testified she has been unable to work since being released from the hospital in February 2000 and thereafter received state disability funds for a year. In March or April 2001 she applied for and has received ever since Supplemental Security Income from the Social Security System. She testified: "I have not been working ever since I was put on disability."

Why should it spend on behalf of an employee who cannot profit from it, while elsewhere a represented employee who could actually benefit might go without?

Matus' disability simply cannot be ignored. It, too, leads to the conclusion that no real remedy was available to Matus; not even a public remedy. Pursuit of such a remedy would be both fruitless and pointless.

For legal reasons, I will dismiss this complaint on §10(b) grounds. Even if that were not the case, I would dismiss on several other bases as well: No obligation to proceed to arbitration; Respondent did inform her about the decision not to proceed, even if slow to do so; No remedy is available; and there was never any merit to the underlying grievance and forcing a union to arbitrate a non-meritorious grievance would constitute a punitive and unjust act.

Based on the foregoing findings of fact and the record as a whole, I hereby make the following

Conclusions of Law

1. Forester Haven is an employer in an industry affecting commerce within the meaning of §2(2), (6) and (7) of the Act.

2. Respondent Hospital and Healthcare Employees Union, Local 399, Service Employees International Union, AFL–CIO is a labor organization within the meaning of §2(5) of the Act.

3. The complaint in this matter is barred by §10(b) of the Act, as the unfair labor practice charge was filed more than 6 months after Charging Party Adrienne Matus knew or should have known that her grievance concerning her February 20, 2000 discharge was not being processed properly.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ¹⁰

ORDER

The complaint is dismissed in its entirety.

Dated: San Francisco, California, May 13, 2004.

James M. Kennedy
Administrative Law Judge

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.